(3) (2)

Nos. 87-1359 and 87-1380

In the Supreme Court of the United States

OCTOBER TERM, 1987

DEMENNO/KERDOON, PETITIONER

v.

UNITED STATES OF AMERICA

TIPPERARY REFINING CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Claims Court had jurisdiction under the Tucker Act, 28 U.S.C. 1491, over claims, ostensibly involving breach of contract, that are based on alleged violations of price control regulations issued pursuant to the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2[1]) is reported at 833 F.2d 301. The opinion of the Claims Court (Pet. App. A3-A29) is reported at 11 Cl. Ct. 572.

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[1] References to the appendix to the petition are to the appendix in No. 87-1359.

JURISDICTION

The judgment of the court of appeals (Pet. App. A30) was entered on November 17, 1987. The petition in No. 87-1359 was filed on February 13, 1988. The petition in No. 87-1380 was filed on February 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of the Interior (DOI) grants oil and gas leases on federally owned lands and offshore properties under the Mineral Lands Leasing Act of 1920, 30 U.S.C. (& Supp. III) 181 *et seq.*, and the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (& Supp. III) 1331 *et seq.* The government retains a royalty interest in these leases, and the Secretary of the Interior is authorized to take royalties in money or in kind. If the Secretary elects to accept royalties in kind, the royalty oil may thereafter be sold to small independent refiners; if the Secretary makes any such sale, he must realize at least the same amount of money that the United States would have obtained if the royalties had originally been taken in cash. 30 U.S.C. 192; 43 U.S.C. 1353.

Petitioners are small refiners of crude oil. In 1980, DeMenno/Kerdoon, petitioner in No. 87-1359, entered into two contracts with the United States, through the United States Geological Survey, a sub-agency of DOI, to purchase royalty oil. One contract involved onshore oil, while the other covered offshore oil. Tipperary Refining Company (Tipperary), petitioner in No. 87-1380, entered into a contract with DOI for the purchase of royalty oil from offshore tracts in 1980. Pet. App. A5-A6.[2] Until

[2] Both contracts for offshore royalty oil provided that the price would be "the regulated price or, if no regulated price applies, * * * the fair market value price" (see 87-1380 Complaint Exh. A at A3;

January 28, 1981, maximum prices for different categories or "tiers" of crude oil were set by the Department of Energy (DOE) under the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1), and the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note. During the time DOE price controls were in effect, producers were required to certify to their purchasers the volumes of oil purchased in each tier within a specified time. See, *e.g.*, 39 Fed. Reg. 1924 (1974); 41 Fed. Reg. 4931 (1976). The President terminated regulation of petroleum pricing on January 28, 1981. Exec. Order No. 12,287, 3 C.F.R. 124 (1982).

2. a. In January 1984 petitioner Tipperary filed an action against DOI in the United States District Court for the Western District of Texas. That suit was brought under Section 210 of the ESA, 12 U.S.C. (1976 ed.) 1904 note, which "authorized any person suffering a legal wrong because of any act arising out of the price control regulations to bring a district court action to recover up to treble damages" (Pet. App. A14).[3] Tipperary alleged that

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87-1359 Complaint Attach. at A3). The "regulated price" was defined as "the highest price (a) at which oil may be sold pursuant to the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. 751 *et seq.*, and any rule or order issued under such Act, or (b) at which Federal oil may be sold under any provision of law or rule or order thereunder which sets a price (or manner for determining a price) for oil." *Ibid.* DeMenno/Kerdoon's contract for onshore oil provided that DeMenno/Kerdoon would pay the market price and did not mention the regulated price (87-1359 Complaint Attach. at B2). In addition, all three contracts provided that they would be "subject to all war or emergency laws of Congress now or hereafter enacted and to all valid orders, rules, and regulations issued pursuant to such laws" (see *id.* at A8, B5; 87-1380 Complaint Exh. A at A8).

[3] Federal court jurisdiction under both the ESA and the EPAA is governed by Sections 210 and 211 of the ESA, 12 U.S.C. (1976 ed.) 1904 note (see 15 U.S.C. 754(a)(1) (EPAA and regulations thereunder

DOI had violated the EPAA regulations by imposing improper surcharges and by failing timely to certify the "tier" under which the price of the royalty oil sold to Tipperary was to be calculated. The complaint did not allege that if DOI's certifications had been timely Tipperary would have paid a lower price for the oil.[4] See 87-1380 Defendant's Mot. to Dis. App. 26-28. Tipperary also claimed that the violations of the EPAA regulations constituted breaches of its contract with DOI because of the provision subjecting the contract to all emergency laws of Congress. See *id.* at 28.

While Tipperary's action was pending in the district court, the Temporary Emergency Court of Appeals (TECA) decided *Lunday-Thagard Co.* v. *United States Dep't of Interior*, 773 F.2d 322 (1985), cert. denied, 474 U.S. 1055 (1986). In *Lunday-Thagard*, TECA held that sovereign immunity bars suits against the government under Section 210 of the ESA, including actions for breach of contract based on violations of the ESA or the EPAA. Accordingly, the district court, on October 9, 1985, dismissed Tipperary's action under Section 210 of the ESA, including its breach of contract claim based on violations of the EPAA, on the authority of *Lunday-Thagard* (Pet. App. A16-A17).[5]

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to be treated like ESA and its regulations for jurisdictional purposes)). Under Section 211(a) of the ESA, the federal district courts have "exclusive original jurisdiction of cases or controversies arising under" the ESA, and therefore the EPAA. Jurisdiction over appeals arising under the ESA or the EPAA is exclusively in the Temporary Emergency Court of Appeals (TECA) under Section 211(b) of the ESA.

[4] Of the roughly $2.672 million Tipperary sought in damages, some $2.617 million derived from the claim based on allegedly improper certifications. 87-1380 Defendant's Mot. to Dis. App. 28, 29.

[5] Tipperary had also alleged that DOI violated the contract by failing to reimburse it for transportation of the royalty oil away from the offshore platforms where it was collected, a claim which on its face appeared to be independent of the EPAA. The district court found

Tipperary thereafter brought this suit in the Claims Court on May 6, 1986. Tipperary alleged that DOI had breached the oil sale contract, that DOI had unlawfully exacted money from Tipperary, and that DOI had taken Tipperary's property without just compensation in violation of the Fifth Amendment. The complaint did not mention the EPAA or the DOE price regulations which had been the basis of Tipperary's action in the district court, although it sought approximately the same amount of damages. Moreover, the complaint did not state that Tipperary had exhausted its administrative remedies for the alleged breach (see 30 C.F.R. Pt. 290; 43 C.F.R. Pt. 4), or that Tipperary had followed the procedures set out in the Contract Disputes Act, 41 U.S.C. (& Supp. III) 601 *et seq.* See 87-1380 Complaint 2-6; see also Pet. App. A26.

b. Petitioner DeMenno/Kerdoon filed suit in the United States Claims Court on May 13, 1986. Like Tipperary, DeMenno/Kerdoon claimed that DOI had breached its contracts, that DOI had unlawfully exacted money, and that DOI had taken DeMenno/Kerdoon's property without just compensation. See 87-1359 Complaint 4-6.[6] The complaint did not allege that DeMenno/Kerdoon had pursued its administrative remedies under DOI regulations or its remedies under the Contract Disputes Act.

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that the amount of that claim exceeded $10,000 and therefore dismissed it without prejudice under the Tucker Act. Pet. App. A17.

[6] Prior to bringing this suit, DeMenno/Kerdoon, in letters to DOI, had alleged overcharges arising from violations of the EPAA regulations of roughly the amounts sought in this case. The vast bulk of those overcharges resulted from allegedly untimely certifications of the type complained of by Tipperary. DeMenno/Kerdoon, like Tipperary, did not suggest that it would have paid a lower price had the certifications been timely. See Pet. App. A14-A15; 87-1359 Defendant's Mot. to Dis. App. 2-18.

3. The Claims Court dismissed both complaints for lack of jurisdiction. While it recognized (Pet. App. A17-A18) that the complaints had been drafted specifically to invoke its Tucker Act jurisdiction, the Claims Court found that "the core of each of the claims under the Tucker Act * * * is a violation of the pricing regulations. Absent the central issue of the alleged violations of the ESA, EPAA and DOE implementing regulations, no claim would exist for breach of contract, violation of statute or regulation, illegal exaction, or 5th Amendment taking." *Id.* at A19.

The Claims Court then explained (Pet. App. A24) that Congress' grant of exclusive jurisdiction to the district courts in Section 211 of the ESA "necessarily means withdrawal of jurisdiction from all other courts, including this court." Accordingly, the Claims Court dismissed "plaintiffs' claims that arose from transactions that occurred during the period prior to [the termination of price regulation under the EPAA]" (Pet. App. A28). The Claims Court also dismissed any claims petitioners may have had that arose out of transactions occurring after decontrol, finding with respect to the post-decontrol claims that petitioners had failed to exhaust their administrative remedies (*id.* at A27-A28).

The Federal Circuit affirmed the Claims Court's decision in a brief per curiam opinion that relied on the lower court's reasoning. Pet. App. A1-A2.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The lower courts properly relied on two fundamental and well-established principles of jurisdiction under the

ESA (and hence the EPAA). The first is that any claim that calls for an interpretation of the ESA or the EPAA (or regulations thereunder) arises under the ESA and is therefore within the exclusive jurisdiction of the district courts under Section 211 of the ESA. See, *e.g.*, *Citronelle-Mobile Gathering, Inc.* v. *Gulf Oil Corp.*, 591 F.2d 711, 716 (Temp. Emer. Ct. App.), cert. denied, 444 U.S. 879 (1979); *Mountain Fuel Supply Co.* v. *Johnson*, 586 F.2d 1375, 1382 (10th Cir. 1978), cert. denied, 441 U.S. 952 (1979); *Mobil Oil Corp.* v. *Tully*, 639 F.2d 912, 915 (2d Cir.), cert. denied, 452 U.S. 967 (1981). The second is that there can be no money recovery against the government on such a claim, unless the government has taken the plaintiff's property without just compensation in violation of the Fifth Amendment. See, *e.g.*, *TransAmerican Natural Gas Corp.* v. *United States Dep't of Interior*, 816 F.2d 689, 691 (Temp. Emer. Ct. App. 1987), cert. denied, No. 86-1712 (Oct. 5, 1987); *Lunday-Thagard Co.* v. *United States Dep't of Interior*, 773 F.2d 322 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1055 (1986); *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources, Ltd.*, 577 F.2d 712 (Temp. Emer. Ct. App.), cert. denied, 439 U.S. 831 (1978); *Griffin* v. *United States*, 537 F.2d 1130 (Temp. Emer. Ct. App.), cert. denied, 429 U.S. 919 (1976) (ESA permits suit for unconstitutional taking). Both *Lunday-Thagard* and *TransAmerican* involved alleged violations of the same EPAA certification regulations at issue in this case.

a. Petitioners maintain (87-1359 Pet. 17-34; 87-1380 Pet. 11-15) that Section 211 of the ESA does not displace the Claims Court's Tucker Act jurisdiction (and therefore the Tucker Act's waiver of sovereign immunity), so that if a case comes within one of the categories described by the Tucker Act, the Claims Court has jurisdiction over it even though the case arises under the ESA within the meaning

of Section 211. Section 211(a), however, gives the district courts "exclusive original jurisdiction of cases or controversies arising under [the ESA], or under regulations or orders issued thereunder, notwithstanding the amount in controversy * * *."[7] By its terms, Section 211(a) deprives any court, including the Claims Court, of jurisdiction over cases that arise under the ESA or the EPAA. In *Trans-American*, TECA agreed with the Claims Court's conclusion in this case that there is no Tucker Act jurisdiction over claims that arise under the ESA. TECA therefore refused to transfer to the Claims Court certain ostensibly contract-based claims that involved the interpretation of the EPAA. 816 F.2d at 691-694.

Faced with the language and consistent interpretation of Section 211, petitioners point to cases in which this Court found that Tucker Act jurisdiction had not been withdrawn by other jurisdictional legislation. See 87-1359 Pet. 18-22; 87-1380 Pet. 11-15, citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), and *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). In those cases, however, the need to avoid possible Takings Clause questions led the Court to hold that any taking effected by the statutes at issue would be compensated in a Tucker Act suit. *Regional Rail Reorganization Act Cases*, 419 U.S. at 134 ("[t]here are clearly grave doubts whether the Rail Act would be constitutional if a Tucker Act remedy were not available"); *Monsanto*, 467 U.S. at 1020 (taking argument not ripe because any taking would be

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[7] As DeMenno/Kerdoon notes (87-1359 Pet. 41), Section 211(a) permits any court to decide "any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by an agency under this title) raised in any proceeding before such court." In this case, however, the EPAA issues are central to petitioners' claims and do not enter as part of a defense.

compensated under Tucker Act). Those considerations have no bearing on this case, because claims based on unconstitutional takings may go forward under the ESA and EPAA (see *TransAmerican,* 816 F.2d at 692, citing *Griffin* v. *United States,* 537 F.2d 1130 (Temp. Emer. Ct. App.), cert. denied, 429 U.S. 919 (1976); *McCulloch Gas Processing Corp.* v. *Canadian Hidrogas Resources Ltd.,* 577 F.2d 712, 716-717 (Temp. Emer. Ct. App.), cert. denied, 439 U.S. 831 (1978)).[8]

b. Petitioners also contend that these cases do not arise under the ESA, arguing that the district courts' exclusive ESA jurisdiction extends only to causes of action created by the ESA and that their causes of action sound in contract. They base this argument on what they contend is the normal meaning of the phrase "arising under" in jurisdictional statutes. 87-1359 Pet. 36-45; 87-1380 Pet. 17-22, citing *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson,* No. 85-619 (July 7, 1986).[9] A case arises under the ESA, however, if it "requires application and interpretation of the EPAA" (*Citronelle-Mobile Gathering, Inc.,* 591 F.2d at 716). This principle applies to contract

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[8] Although petitioners alleged unconstitutional takings in order to invoke the jurisdiction of the Claims Court (see Pet. App. A17), they do not actually suggest any "taking" other than a breach of contract, and do not seriously argue that there has been any violation of the Fifth Amendment (see *TransAmerican,* 816 F.2d at 693 n.7 (no takings claim based solely on contract overcharges)).

[9] Tipperary errs in implying (87-1380 Pet. 17-19) that under *Merrell Dow* a case arises under federal law for purposes of 28 U.S.C. 1331 *only* if it involves a federally created cause of action. *Merrell Dow* specifically rejected that rule and recognized that jurisdictional issues must be decided through a sensitive inquiry into the meaning and purpose of the relevant statutes (slip op. 4-8). Petitioners are incorrect in suggesting that there is some single, clear meaning that attaches to the words "arising under" whenever Congress uses them.

issues that require interpretation of EPAA regulations. *TransAmerican,* 816 F.2d at 693. The special jurisdiction created by Section 211 of the ESA reflects Congress' desire to ensure that the interpretation of the emergency price control legislation would be swift and uniform (see, *e.g., Citronelle-Mobile Gathering, Inc.,* 591 F.2d at 716). Accordingly, as *Merrell Dow* teaches, the words "arising under" in Section 211 have been construed so as to give effect to the underlying congressional purpose. *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.,* 604 F.2d 179, 182-187 (2d Cir. 1979). Petitioners' suggestion that the exclusive jurisdiction of the district courts extends only to claims that affirmatively rely on the cause of action created in Section 210 of the ESA is therefore incorrect.[10]

Petitioners also suggest (87-1359 Pet. 25-31; 87-1380 Pet. 20-21) that these cases involve, not the interpretation or application of the EPAA, but simply the interpretation of contracts which define their price terms by reference to the price control regulations.[11] TECA (see *TransAmerican,* 816 F.2d at 693) and the Federal Circuit in this case have properly rejected this distinction, under which contracting parties could opt out of the system Congress

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[10] Petitioners are also wrong in suggesting (87-1359 Pet. 31-34; 87-1380 Pet. 17-19) that the courts of appeals have paradoxically held that petitioners' causes of action both arise under the ESA and do not arise under the ESA. These cases arise under the ESA, and are within the exclusive jurisdiction created by Section 211 of the ESA, because they require the application of EPAA regulations. Petitioners are not entitled to any *relief* under the ESA, however, because Congress has not waived sovereign immunity with respect to non-takings claims that come within the exclusive jurisdiction created by Section 211.

[11] Even if this argument is correct, DeMenno/Kerdoon cannot possibly prevail on its contract respecting onshore oil, since that contract does not even refer to the regulated price.

established to ensure swift and uniform interpretation of the price control regulations, simply by agreeing to be bound by the law. Moreover, before it could consider this argument, the Court would first have to reach a question of contract interpretation not addressed below, and decide whether petitioners are correct in claiming that the agreements simply employ the regulations as a benchmark.

2. DeMenno/Kerdoon suggests (87-1359 Pet. 35) that it may obtain a money remedy in the Claims Court for violations of OCSLA, which required that sales of royalty oil to small refiners such as petitioners take place at the regulated price while price controls were in effect (43 U.S.C. 1353(b)(2) and (e)).[12] As this Court explained in *United States* v. *Mitchell,* 463 U.S. 206, 216 (1983), however, "[n]ot every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act." Rather, "the claimant must demonstrate that the source of substantive law he relies upon ' "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." ' " *Id.* at 216-217 (quoting *United States* v. *Testan,* 424 U.S. 392, 400 (1976), quoting *Eastport S.S. Corp.* v. *United States,* 372 F.2d 1002, 1009 (Ct. Cl. 1967)). No provision of OCSLA can fairly be interpreted as mandating compensation by the federal government to petitioners.

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[12] DeMenno/Kerdoon suggests (No. 87-1359 Pet. 46) that the "central purpose" of the 1978 OCSLA amendments was "to require the Government to comply with applicable price regulations in selling oil to small refiners during the regulation period." To the contrary, the principal purpose of the 1978 amendments was to expedite development of the Outer Continental Shelf without jeopardizing the environment. See H. R. Rep. 95-590, 95th Cong., 1st Sess. 53 (1977). We are aware of no mention in the legislative history of Congress' reason for adding the requirement that royalty oil be sold to small refiners at the regulated price

DeMenno/Kerdoon asserts (87-1359 Pet. 35) that OCSLA mandates compensation and alludes to 43 U.S.C. 1339 in support of that proposition by citing *Amoco Production Co.* v. *Hodel,* 815 F.2d 352, 357 n.6, 360 (5th Cir. 1987) (43 U.S.C. 1339 can fairly be interpreted as mandating refunds by federal government to overpaying lessees), petition for cert. pending, No. 87-372; see also *United States* v. *Laughlin,* 249 U.S. 440, 442-443 (1919). Section 1339 does mandate compensation by the federal government in certain cases, but not in the case of DeMenno/Kerdoon. That provision states that lessees of offshore oil and gas leases may obtain refunds for overcharges by DOI. See 815 F.2d at 357 n.6, 360. Petitioners are purchasers of royalty oil, not lessees, and the provision does not apply to them. DeMenno/Kerdoon also points out (87-1359 Pet. 35 n.4) that 43 U.S.C. 1349(a)(1) authorizes "[citizen suits] * * * to compel compliance" with OCSLA. The citizen suit provision, however, refers only to compliance and does not mention any damages remedy against the United States.[13] Finally, 43 U.S.C. 1349(a)(6), on which DeMenno/Kerdoon also relies (87-1359 Pet. 35-36), preserves causes of action but does not purport to mandate compensation of its own force.

3. Finally, this case would present no issue worthy of review even if petitioners were correct about the jurisdiction of the Claims Court. As the Claims Court noted (Pet.

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[13] DeMenno/Kerdoon suggests (87-1359 Pet. 35 n.4) that this Court's decision in *Porter* v. *Warner Holding Co.,* 328 U.S. 395, 400 (1946), holds that a statutory provision authorizing enforcement of price controls implies a remedy for overcharges. In that case, however, the Court held that the statutory injunctive remedy implied that a court could use its equitable powers to require restitution. Recovery against the government, however, must rest on a statute creating an action for money damages, *United States* v. *Mitchell,* 463 U.S. at 216-217, not simply for equitable relief.

App. A25), petitioners alleged that DOI breached its contracts with petitioners during both the period after decontrol and the period when regulation was in effect. Because the ESA's exclusive jurisdiction does not apply to post-decontrol breaches, the Claims Court considered those allegations and found that petitioners had failed to exhaust their administrative remedies (*id.* at A25-A28). Petitioners have not challenged that holding in this Court, and they do not argue that they pursued their administrative remedies with respect to the alleged breaches that occurred while price controls were in effect. Petitioners' complaints also did not allege that they had complied with the Contract Disputes Act, 41 U.S.C. (& Supp. III) 601 *et seq.*, a necessary prerequisite for an action in the Claims Court on a contract covered by the Act. See, *e.g.*, *LDG Timber Enterprises, Inc.* v. *United States,* 8 Cl. Ct. 445, 451-452 (1985) (failure to certify claim to contracting officer deprives Claims Court of jurisdiction).[14]

Moreover, this case presents no question of continuing importance. Despite petitioners' suggestions to the contrary, it involves only the special jurisdictional features governing now-expired price control regulations. The predominant federal energy policy since the decontrol of the price of oil has been "to wind up regulation of the oil

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[14] Were the merits to be reached, it seems unlikely that petitioners would obtain any significant relief, even if they were to prevail on their miscertification claims, because they do not allege any significant harm: they do not claim that had DOI's certifications been timely they would have paid a lower price for the oil. Moreover, the Department of Energy is authorized to grant exceptions relief for certification errors such as petitioners allege (42 U.S.C. 7194), and has been prepared to do so in similar situations involving DOI. See *Department of the Interior—Laketon Asphalt Refining, Inc.*, 12 Energy Mgmt. (CCH) ¶ 81,012 (Dep't Interior 1984), review sought in *Laketon Asphalt Refining, Inc.* v. *DOE,* No. EV 84-264-C (S.D. Ind.)).

industry." *Johnson Oil Co.* v. *DOE*, 690 F.2d 191, 196 (Temp. Emer. Ct. App. 1982). Neither the substance of federal oil price regulation—which would determine the outcome of this case should the merits be reached—nor the scope of the exclusive jurisdiction created by Section 211 of the ESA has any ongoing significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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